(3)

No. 86-1492

In the Supreme Court of the United States

OCTOBER TERM, 1986

HOSPITAL CORPORATION OF AMERICA, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in concluding that substantial evidence supported the Federal Trade Commission's findings regarding the probable anticompetitive effects of petitioner's corporate acquisitions, the court of appeals gave sufficient consideration to market characteristics in addition to market concentration statistics.

2. Whether this Court should consider the constitutionality of the exercise of enforcement authority by Federal Trade Commissioners not removable at will by the President, when the issue was neither properly raised nor decided in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 807 F.2d 1381. The opinion and order of the Federal Trade Commission (Pet. App. 26a-138a) are reported at 106 F.T.C. 455. The initial decision of the administrative law judge (Pet. App. 139a-276a) is reported at 106 F.T.C. 368.

JURISDICTION

The judgment of the court of appeals (Pet. App. 24a-25a) was entered on December 18, 1986. The petition for a writ of certiorari was filed on March

16, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent portions of Article II of the Constitution and of Section 7 of the Clayton Act, 15 U.S.C. 18, and Sections 1 and 5 of the Federal Trade Commission (FTC) Act, 15 U.S.C. 41, 45, are set forth at Pet. 2-3.

STATEMENT

1. Petitioner Hospital Corporation of America is the largest proprietary hospital chain in the United States. In late 1981, petitioner acquired two other hospital corporations, Hospital Affiliates International, Inc. (HAI), and Health Care Corporation (HCC), through stock transactions valued at approximately $700 million. By virtue of these acquisitions, petitioner went from ownership of one acute care hospital in the Chattanooga, Tennessee, urban area to ownership of three such hospitals and management of two others. Petitioner thus became owner or manager of five of the eleven acute care hospitals in the Chattanooga urban area. Pet. App. 1a-3a, 40a-41a, 148a-151a.

2. The Federal Trade Commission (Commission or FTC), after completing its investigation of the effects of these acquisitions in the Chattanooga market,[1] issued an administrative complaint against peti-

[1] The Department of Justice separately reviewed the acquisition of HAI alone. After completing that review, the Department granted clearance to the FTC to investigate the distinct problem of the combined effect of petitioner's acquisitions of HAI and HCC in Tennessee. The Department's closing of its inquiry into the acquisition of HAI alone is in

tioner on July 30, 1982. The complaint alleged that, by acquiring HAI and HCC, petitioner had violated Section 7 of the Clayton Act, 15 U.S.C. (& Supp. III) 18, and Section 5 of the FTC Act, 15 U.S.C. (& Supp. III) 45. According to the complaint, those acquisitions were likely to lessen competition substantially or might tend to create a monopoly in the market for acute care hospital services in the Chattanooga urban area. Pet. App. 1a-2a, 41a, 144a-147a.

After "extensive discovery" and several months of evidentiary hearings (Pet. App. 147a), an administrative law judge (ALJ) found that the acquisitions violated the law because of their probable anticompetitive effects in the Chattanooga market (*id.* at 262a-263a). The ALJ ordered petitioner to divest itself of the two Chattanooga hospitals of which it had acquired ownership and to provide prior notification to the Commission of certain of its future hospital acquisitions. *Id.* at 3a, 41a, 263a-276a. On appeal from the ALJ's decision, the Commission modified some of the ALJ's findings and concluded that petitioner's acquisition of ownership or management of four new hospitals, taken together, was unlawful, because the acquisitions may substantially lessen competition in the Chattanooga urban area acute care hospital market. *Id.* at 125a-126a, 128a.

At the outset of its analysis of probable anticompetitive effects, the Commission found that the acquisitions resulted in a significant increase in concentration in a market that was already highly concen-

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no way inconsistent, and the Department has no disagreement, with the Commission's conclusions about the anticompetitive potential of the HAI and HCC acquisitions together.

trated. Pet. App. 91a.[2] It determined that this increase in concentration "points toward a finding of likely harm to competition, all other things being equal" (*id.* at 90a). It explicitly recognized, however, that "all other things are not equal in this market, and statistical evidence is not the end of our inquiry" (*id.* at 91a).

Noting that "an exercise of market power can be defeated or deterred by the entry or potential entry of new firms" (Pet. App. 91a), the Commission began its consideration of relevant market characteristics other than market share by finding that state "certificate of need" legislation either completely precludes new entry or delays it to such a degree as to constitute a substantial entry barrier (*id.* at 91a-102a). The Commission next concluded that hospital markets in general, and the Chattanooga market in particular, possess several characteristics that make anticompetitive effects likely when such markets become highly concentrated. *Id.* at 107a. Among these are a small absolute number of competitors, low price elasticity of demand, pressures to contain costs, a tradition of limited price competition and disapproval of advertising, and a long history of cooperative behavior among Chattanooga hospitals. *Id.* at 108a-110a.

The Commission also analyzed the market characteristics cited by petitioner as presenting obstacles to anticompetitive behavior. These include the presence

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[2] Petitioner's market share increased from 14% to 26%, and the market share for the top four firms increased from 79% to 91%. Similarly, the Herfindahl-Hirschman Index increased from over 1900 points (indicating a market already highly concentrated) to approximately 2200 points. Pet. App. 87a-91a.

of non-profit hospitals in the market, the heterogeneous nature of hospital services, the role of insurance companies and other third-party payors, the alleged difficulty of policing an anticompetitive agreement, and the existence of rapid technological change. After careful review, the Commission determined that those factors did not make anticompetitive behavior substantially less likely. Pet. App. 110a-125a. The Commission similarly rejected a number of defenses raised by petitioner, including the assertion that significant efficiencies would result from the acquisitions (*id.* at 126a-127a).

Having found liability, the Commission issued a cease and desist order requiring divestiture of petitioner's current interests in the hospitals previously owned and managed by HAI and HCC. The Commission also imposed a modified version of the ALJ's prior-notification requirement and an additional requirement of prior Commission approval of petitioner's future hospital acquisitions in the Chattanooga urban area. Pet. App. 128a-133a.

3. The court of appeals affirmed and enforced the Commission's order in its entirety. Pet. App. 1a-23a. Observing that the Commission had conducted a "detailed analysis" of anticompetitive effects that "fill[ed] most of a 117-page opinion" (*id.* at 5a), the court held that the Commission had applied proper legal standards and that its findings that the acquisitions created a significant threat to competition were supported by substantial evidence (*id.* at 3a-19a).

After noting that the market concentration statistics showed a significant increase in concentration in a highly concentrated market (Pet. App. 3a), the court discussed the relevant case law and noted ap-

provingly that the Commission did not rest its decision on market concentration statistics alone but inquired into other market characteristics and the probability of harm to consumers (*id.* at 7a). The court adopted the same approach, stating that it "could not uphold the Commission's decision on a rationale different from its own" (*ibid.*). The court therefore reviewed in detail the numerous market characteristics identified by the Commission and by petitioner as relevant to the question of anticompetitive potential of the acquisitions. *Id.* at 8a-19a.

After extensive analysis, the court concluded that the Commission's determination regarding the likelihood of anticompetitive effects was supported by a number of market characteristics beyond market concentration—*e.g.*, the absence of competitive alternatives, the existence of regulatory barriers to entry, the low elasticity of demand, the severe pressures to contain costs placed on hospitals by insurers and by the federal government, and the sharp reduction in the number of substantial competitors. Pet. App. 8a-14a. The court then analyzed the reasons advanced by petitioner as tending to detract from a conclusion that collusion was a serious danger—*e.g.*, the complexity and heterogeneity of hospital services, the presence in the market of non-profit hospitals, the fast pace of technological change, the role of large insurance companies, and opposition to the acquisition from a competitor. *Id.* at 14a-19a. The court held that it was for the Commission to determine the weight of these various market factors and that the Commission's assessment that anticompetitive effects were reasonably probable in this case was supported by substantial evidence and should not be disturbed on appeal. *Id.* at 14a-15a.

The court also rejected petitioner's effort to raise on appeal a new argument, not made before the Commission, that the Commission's use of its enforcement powers was unconstitutional because the authority exercised was executive and the commissioners of the FTC are not subject to removal at will by the President. The court asserted that petitioner was, in fact, asking it to adopt a position that "would make every independent administrative agency unconstitutional" (Pet. App. 20a). The court observed that, despite the potentially far-reaching effects of petitioner's contentions, and the fact that it had been granted leave to file a 90-page brief, petitioner had devoted only three pages of its opening brief and one page of its reply to a presentation on the issue that left many important questions unanswered. *Id.* at 20a-22a.[3] In the circumstances, the court said,

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[3] The court of appeals wrote (Pet. App. 20a-21a (emphasis in original)) that petitioner had

> made no effort to show that the President *wants* to remove any member of the FTC who voted for the complaint in this case, or that the complaint would not have been issued if the President had plenary removal power, or that the concept of "cause" is too restrictive to satisfy the constitutional provisions vesting executive power in the President, or that the allegedly unconstitutional limitation on the President's power to remove FTC commissioners can't be severed from the Commission's power to file complaints [citation omitted]. We are not even told whether the commissioners who voted for the complaint were appointed by President Reagan; if they were, it becomes somewhat implausible to suppose that the complaint would not have been issued if the President had the power to remove them. * * *. So there is no showing that the FTC is acting at cross purposes with the President in this matter. There just is no reason to think the

"[f]our pages is not an adequate presentation of the case for this revolutionary result. Brevity may be the soul of wit, but seismic constitutional change is not a laughing matter" (*id.* at 20a). Thus, the court held that the constitutional issue had not been adequately raised and declined to reach the merits. *Id.* at 22a.

ARGUMENT

The decision of the court below is correct and does not conflict with any decision of this Court or another court of appeals. Further review by this Court is unwarranted.[4]

1. Petitioner's first contention (Pet. 6-11) is that the court of appeals erred by placing "near dispositive reliance" on market share and concentration statistics (*id.* at 10). This argument rests on a serious mischaracterization of the Seventh Circuit's decision.

This Court has consistently held that statistics concerning market share and concentration are of "great significance" in assessing the legality of a merger. *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 498 (1974); see, *e.g.*, *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86, 120 (1975); *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 631 (1974). Consequently, both the court of appeals and the Commission quite properly commenced their analyses of the probable anticompetitive effects of the challenged acquisitions

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complaint would not have been issued but for the allegedly unconstitutional feature of the FTC's structure.

[4] The divestiture order of the FTC, enforced by the court of appeals, is automatically stayed pending final disposition of this petition for a writ of certiorari. 15 U.S.C. 45(g).

by examining market shares and concentration ratios (Pet. App. 3a, 87a-97a). Recognizing, however, that such statistics alone are not conclusive (see *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. at 631-632; *United States* v. *General Dynamics Corp.*, 415 U.S. at 498), the court, like the Commission before it, then examined in detail a wide variety of market factors directly bearing on the likelihood of anticompetitive effects, including barriers to entry, inelastic demand, past cooperative behavior, cost containment pressures, and many others (Pet. App. 7a-19a, 91a-125a).[5]

Contrary to petitioner's repeated assertions (Pet. 5-11), the court did not view market shares as essentially dispositive. To the contrary, the court approvingly observed that the Commission had acted "prudent[ly]" by considering market characteristics rather than resting solely on market concentration ratios, as many of the merger decisions of the 1960s did (Pet. App. 7a, 11a). After reviewing the Commission's decision based on this expressed rationale (see *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-89 (1943)), the court concluded (Pet. App. 14a)[6]:

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[5] Correctly applying the substantial evidence test (see, *e.g.*, *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 487-488 (1951)), the court considered whether the Commission's conclusion of likely anticompetitive effects was supported by substantial evidence in light of both the supporting evidence and the various market characteristics cited by petitioner as detracting from the likelihood of collusion. Pet. App. 14a-19a, 110a-125a.

[6] As the court of appeals noted (Pet. App. 4a-5a, 14a-15a), petitioner misconceived (and apparently still misconceives (see Pet. 10)) the role of a reviewing court in a substantial evidence case. The question for the court was not whether the

> Considering the concentration of the market, the absence of competitive alternatives, the regulatory barrier to entry (the certificate of need law), the low elasticity of demand, the exceptionally severe cost pressures under which American hospitals labor today, the history of collusion in the industry, and the sharp reduction in the number of substantial competitors in this market brought about by the acquisition of four hospitals in a city with only eleven (one already owned by Hospital Corporation), we cannot say that the Commission's prediction is not supported by substantial evidence.

The court's thorough consideration of relevant market characteristics other than market shares occupied virtually the entire discussion of petitioner's antitrust challenge (*id.* at 4a-19a).[7]

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acquisitions created a danger of anticompetitive effects, but whether the Commission's conclusion that they did was supported by substantial evidence on the record as a whole. The Court answered the latter question in the affirmative, and petitioner does not, and could not, contend that this is one of "the rare instance[s] when the [substantial evidence] test appears to have been misapprehended or grossly misapplied." *American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U.S. 490, 523 (1981); *Universal Camera Corp.* v. *NLRB*, 340 U.S. at 491.

[7] Petitioner maintains (Pet. 9) that it was the view of the court of appeals that *United States* v. *General Dynamics*, *supra*, and *United States* v. *Citizens & Southern National Bank*, *supra*, created only narrow, factbound exceptions to the general principle that market shares are dispositive. In fact, the court of appeals said only that "it can be argued" that *General Dynamics* and *Citizens & Southern* should be interpreted in this manner (Pet. App. 6a-7a). More important, the court's discussion of these and other cases (*ibid.*) leaves no doubt that it understood that there has been a marked shift

In sum, petitioner's first contention rests on a false premise. It is apparent from the Seventh Circuit's opinion that the court, like the Commission, gave full and fair consideration to the competitive characteristics of the market and did not treat market concentration as dispositive.[8] Petitioner's assertion to the contrary is incorrect.

2. Petitioner contends (Pet. 11-17) that Congress may not, consistent with the Constitution's vesting of the executive power in the President, authorize the Commission to initiate and carry on law enforcement proceedings and at the same time provide that FTC commissioners may not be removed by the President except for "inefficiency, neglect of duty, or malfea-

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away from the treatment of market share statistics as nearly decisive. Indeed, the court commended the Commission for rejecting such a limited approach and instead taking into account the full range of market characteristics. *Id.* at 7a, 11a, 14a. Moreover, as the court observed, even if it believed this more limited approach was appropriate, a reviewing court "could not uphold the Commission's decision on a rationale different from its own" (*id.* at 7a).

Petitioner also quotes (Pet. 9) the court as stating that the Commission need have "gone no further" than market share data. What the court actually stated was: "Maybe [the Commission] need have gone no further. * * * But it did." (Pet. App. 11a (citations omitted)). The court then analyzed the factors considered by the Commission.

[8] Since the court in fact considered market factors other than concentration statistics, the decision is not in conflict with any decision cited by petitioner (Pet. 8-10) as holding that such consideration is necessary. Moreover, the detailed analyses of market factors conducted by the court and the Commission, coupled with the emphasis on the circumstances of each particular case, make clear the fallacy in petitioner's assertion (*id.* at 11) that, under the court of appeals' decision, any significant horizontal acquisition in the hospital industry would necessarily be illegal.

sance in office" (15 U.S.C. 41). This contention does not warrant the Court's review.

In the court of appeals, petitioner devoted only three pages of its 85-page opening brief, and one page of its reply brief, to a perfunctory presentation of this constitutional argument, one that failed to address important aspects of the issue. See pages 7-8, *supra*. The court of appeals, stating that it could "not be forced to consider far-reaching constitutional contentions presented in so offhand a manner" (Pet. App. 20a), therefore properly declined to consider the merits of the argument (*id.* at 20a-22a). See *Bonds* v. *Coca-Cola Co.*, 806 F.2d 1324, 1328 (7th Cir. 1986); *Hershinow* v. *Bonamarte*, 735 F.2d 264, 266 (7th Cir. 1984); *Carducci* v. *Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). Because the constitutional issue was neither properly raised nor decided in the court below, it is not appropriate for consideration by this Court. See *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 283 (1978); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Consideration of petitioner's challenge to the FTC would be particularly inappropriate because of the possible implications of the challenge. Petitioner's challenge implicitly raises questions about activities of other administrative agencies whose members the President selects but may not remove without complying with certain statutory standards. Pet. App. 20a. In the absence of a decision on (or proper raising of) the issue below, or of any conflict in the circuits,[9] this case presents no occasion for this Court to consider a contention with such serious implications.

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[9] Petitioner cites no case contrary to the rulings of several courts of appeals (*e.g.*, *FTC* v. *American National Cellular*,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Inc., 810 F.2d 1511 (9th Cir. 1987); *ICC* v. *Chatsworth Co-operative Marketing Ass'n*, 347 F.2d 821 (7th Cir.), cert. denied, 382 U.S. 938 (1965)) that have rejected challenges like petitioner's.

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